1975

State of Utah v. David E. Reynolds : Brief of Respondent

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

DAVID E. REYNOLDS,
Defendant-Appellant.

Case No. 13680

BRIEF OF RESPONDENT

Appeal from a jury verdict of guilty in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Joseph G. Jeppson, Judge, Presiding.

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STATEMENT OF THE NATURE OF THE CASE

The appellant, David E. Reynolds, appeals from a jury verdict of guilty of unlawful distribution for value of a controlled substance in the Third Judicial District Court, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant was found guilty by a jury of un-

lawful distribution for value of a controlled substance in the Third Judicial District Court on February 20, 1974.

Appellant was then sentenced to the Utah State Prison for the indeterminate term as provided by law on March 19, 1974, by the Honorable Joseph G. Jeppson, Judge.

RELIEF SOUGHT ON APPEAL

The respondent respectfully submits that the jury verdict of guilty in the Court below should be affirmed.

STATEMENT OF FACTS

In September, 1973, Salt Lake County Deputy Sheriff Ralph R. Tolman was approached by Scott Helmsin, who stated that he wished to work with Tolman as his agent to help him in the purchasing of a controlled substance from David Reynolds, the appellant (T. 80-81). Officer Tolman told Helmsin that if he could deal with someone to set up a buy and then contact him and they would make the buy together (T. 82). On October 11, 1973, Helmsin called Officer Tolman and told him that they should be able to find the appellant that evening (T. 83).

At approximately 8:55 p.m., on October 11, 1973, Officer Tolman, along with Helmsin and Deputy Sheriff Jim Duncan drove to an apartment complex in Salt Lake County where they met the appellant (T. 83, 85). Helmsin asked the appellant if he could get Speed (T. 86). Appellant replied, "How many?"

and Officer Tolman responded by saying, "A hundred," and the appellant said "All right." (T. 87, 90). Officer Tolman then asked the price and appellant said, "twenty dollars." (T. 90). When Officer Tolman complained about the price, appellant said, "That's the price if you want them." (T. 91). Officer Tolman then gave appellant twenty dollars and appellant said he would be back in about ten minutes (T. 91, 93). Appellant returned at 9:10 p.m., and Officer Tolman approached his truck on the driver's side (T. 93, 94). Appellant handed a little package to Helmsin who in turn handed it to Officer Tolman (T. 94). Officer Tolman immediately placed the package, containing approximately one hundred tablets in an evidence envelope. On November 9, 1973, a laboratory anaylsis of the tablets disclosed that they were amphetamine (T. 125-126).

Appellant was arrested on a warrant for unlawful distribution for value of a controlled substance on November 7, 1973 (T. 5, 115). On November 8, 1973, Mr. Don L Bybee represented the defendant in a hearing for a bond reduction and was successful in convincing the court to reduce appellant's bond to $2,000 (T. 4). Mr. Bybee then represented the appellant at a hearing before the Honorable Joseph G. Peppson, to determine whether or not there was entrapment leading to appellant's arrest (T. 52). The court found there was not sufficient evidence to find any entrapment (T. 67).

Mr. Bybee was also retained by the appellant to

represent him at his trial on February 19 and 20, 1974 (T. 72). After conducting a vigorous and extensive defense of the appellant, Mr. Bybee withdrew his requested jury instructions which he had submitted to this Court, because he and the appellant felt they were substantially covered by the Court's instructions (T. 226). After the jury found the appellant guilty of unlawful distribution for value of a controlled substance (T. 228), Mr. Bybee made a motion for a verdict of not guilty notwithstanding the verdict of the jury, which the Court denied (T. 231). After the verdict, Mr. Bybee was successful in persuading the Court to allow the appellant to remain free on bond until his sentencing appearance (T. 231).

Mr. Bybee next represented the appellant at his sentencing hearing on March 19, 1974, at which time the appellant was sentenced for the indeterminate term as provided by law (T. 45). On April 22, 1974, Mr. Bybee filed a timely notice of appeal on behalf of the Appellant (T. 46). Mr. Bybee petitioned the Court on May 17, 1974, to allow him to withdraw as attorney for the appellant in this appeal inasmuch as the appellant has been unable to pay attorney's fees involved in his defense (T. 48).

ARGUMENT

POINT I

APPELLANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL AT

ALL STAGES OF THE CRIMINAL PROCEEDINGS AGAINST HIM.

The right to effective or adequate assistance of counsel was enunciated by the United States Supreme Court in *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 72 L.Ed. 158 (1932), which held that failure to make an effective appointment of counsel violates the Sixth Amendment right to counsel and is a denial of due process under the Fourteenth Amendment.

The Utah Supreme Court announced a similar view in *State v. Hines,* 6 Utah 2d 126, 307 P.2d 887 (1957), holding that the privilege of an accused to the assistance of counsel is one of the fundamental rights, meaning the assistance of a reputable member of the bar who is willing and in a position to honestly and conscientiously represent the interest of the defendant. In *Alires v. Turner,* 22 Uah 2d 118, 449 P.2d 241 (1969), the Utah Supreme Court stated the requirements consistituting "effective counsel":

> "The requirement is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused. The entitlement is to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the defendant and present such defenses as are available to him under the law and consistent with the ethics of the profession." 449 P.2d at 243.

The record is replete with examples that appellant's retained counsel, Mr. Don L. Bybee, had a real and sincere concern about the interests of his client and conducted his defense in a professional and commendable manner using a variety of legal skills. Mr. Bybee was successful in convincing the court to lower the appellant's bond when he was arrested so he could be free until the trial (T. 4). Mr. Bybee recognized the possible defense of entrapment and presented a well-prepared attack at the entrapment hearing (T. 52). At the trial itself, Mr. Bybee appeared to raise every objection which was available to him. Upon cross-examination of the State's witnesses, he skillfully attacked their memory of the events on the night of the drug sale and attempted to use the testimonies of these adverse witnesses to establish possible defenses for the actions of his client. Mr. Bybee called a female acquaintance of the appellant, who provided evidence of entrapment favorable to the defense (T. 140). Finally, defense counsel called the appellant as a witness and carefully and skillfully established his defense through his client's own words (T. 162).

After the jury had returned a verdict of guilty, defense counsel still expressed a concern for the interests of his client. Mr. Bybee used the wise tactic of a motion for a verdict of not guilty notwithstanding the verdict of the jury (T. 231); he persuaded the Court to allow the appellant to remain on bond until his sentencing (T. 231); he represented the appellant at his sentencing (T. 45); and he then filed a timely notice of appeal

from the conviction (T. 46). Mr. Bybee withdrew as appellant's attorney on the appeal only when it appeared that the appellant would not even be able to pay for the expense accrued during his previous defense (T. 48).

The total sum of these acts indicates the appellant was represented by a capable attorney who was well versed in the facts of the case, interested in the future of his client, and presented a defense in a conscientious and adequate manner. The appellant received effective counsel, which does not mean errorless counsel, and not counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. *United States v. Fruge,* 495 F.2d 557 (5th Cir. 1974).

POINT II

THE MERE FAILURE TO REGUEST A SPECIFIC JURY INSTRUCTION DOES NOT AMOUNT TO A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant contends that he did not receive effective assistance of counsel because his attorney failed to present his case in a fundamental respect in that he failed to request a specific jury instruction. Appellant's Brief at 6.

In *Andreason v. Turner,* 27 Utah 2d 182, 493 P.2d 1278 (1972), the petitioner in an appeal from a denial of his writ of habeas corpus contended that he was denied

effective counsel because his attorney failed to request an instruction on alibi. In disposing of the contention the Utah Supreme Court said:

> "His [defense counsel] omission of a request for an instruction on alibi may have been an oversight or a matter of strategy after evaluating the testimony of the alibi witnesses. Nevertheless, a review of the record negates a conclusion, as expressed by plaintiff, that defense counsel's presentation was tantamount to a sham or pretense of an appearance in the record with no real concern about the interests of his client." 493 P.2d at 1280.

The record indicates that appellant's counsel was well aware of the instructions that were presented to the jury. When asked by the Court if he had any exceptions to the instructions, the following response followed:

> MR. BYBEE: Thank you. For the record, the defendant, David Reynolds, withdraws the requested instructions which we have submitted to the Court because we believe that they are substantially covered by the Court's instructions. (T. 226).

Mr. Bybee then proceeded to take exception to two of the instructions presented by the Court (T. 226). It is possible that Mr. Bybee was well aware there was no instruction on the issue whether or not Mr. Reynolds

was acting as an agent of the police in obtaining a controlled substance, but omitted it because of his overall trial strategy.

It is an established rule in many jurisdictions that counsel is not to be second-guessed on matter of judgment or trial strategy and even mistakes and an unfavorable result does not, by itself, amount to a denial of effective assistance of counsel. *Application of Lomich,* 221 F.Supp. 500 (D.C. Mont. 1936); *United States v. Cariola,* 211 F.Supp. 423 (D.C.N.J. 1962); *United States ex rel, Blolth v. Denno,* 313 F.2d 364 (2d Cir. 1963); *Kapsalis v. United States,* 345 F.2d 392 (7th Cir. 1965). Mistakes of counsel or trial strategy that backfires does not amount to a denial of due process unless on the whole the representation is of such low caliber as to be equivalent to no representation at all, and to reduce the proceedings to a farce or a sham. *People v. Hinton,* 132 Ill.2d 409, 270 N.E.2d 93 (1971); *Kapsalis v. United States, supra.*

Respondent also contends that the fact petitioner retained his own counsel ought to be fatal to his allegation. Courts have often attached some significance to whether the attorney was privately retained or court-appointed in determining whether relief should be granted. In *Snead v. Smyth,* 273 F.2d 838 (4th Cir. 1959), the court said:

> "It has been repeatedly held that in cases of counsel selected by the defendant, the com-

> mission of what retroactively may appear to be errors of judgment on the part of the attorney does not constitute a constitutional lack of due process. . ." *Id.* at 842.

In *Popeko v. United States,* 294 F.2d 168 (5th Cir. 1961), *cert. den.* 374 U.S. 835, 83 S.Ct. 1883, 10 L.Ed. 2d 1056 (1963), the privately retained trial attorney failed to call defendant's witnesses and the Court said:

> ". . . we think it basic to the claim of relief, since defendants were represented by their own employed trial counsel, that they may not assign as error that the mistakes or errors of their counsel constitued an unfair trial. . . ." *Id.* at 171.

Respondent submits that on appeal, this Court should take cognizance of the presumption that the appellant's rights were safeguarded by the trial court, and that the defense counsel faithfully performed his duty to protect the rights of his client. See *Busby v. Holman,* 356 F.2d 75 (5th Cir. 1966). It then becomes incumbent upon the appellant to prove his right to relief by showing the incompetency of his counsel. Such a burden is a heavy one and relief is granted only in extreme cases where counsel has been so grossly ineffective as to constitute no representation at all, or a farce, sham, or pretense. Respondent contends that this burden of proof has not been met by appellant and the decisions

and strategy of his trial counsel were made in his best interest.

This Court in *Jaramillo v. Turner,* 24 Utah 2d 19, 465 P.2d 343 (1970), warned that many guilty men have escaped their punishments from the law through the loophole of claiming inadequate representation of counsel, and that lawabiding citizens would suffer unless courts look more carefully at the requirements for effective counsel as set forth in the constitution. In a reaffirmance of this view, Mr. Justice Crockett recently stated in *State v. Harris,* 30 Utah 2d 354, 517 P.2d 1313 (1974), the following compelling logic:

> "In regard to the defendant's contention that he was denied effective counsel: we are implied to remark that it is nothing less than shameful that our law seems to have degenerated to a point where whenever an accused is convicted of crime, the charge of incompetency of counsel is, with ever increasing frequency, leveled at capable attorneys who have given entirely adequate service, when the real difficulty was that he had a guilty client. In this respect also defendant had his entitlement of adequate representation by capable and conscientious counsel." 517 P.2d at 1315

CONCLUSION

Respondent contends that based upon the foregoing reasons, appellant was afforded the effective assistance of counsel by a capable and conscientious at-

torney and any possible error by defense counsel did not amount to a denial of due process. The respondent, therefore, requests that the judgment below be affirmed.

Respectfully submitted,

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